

1982 WL 189516 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 22, 1982

\*1 Kenneth G. Goode, Esquire  
Fairfield County Attorney  
210 South Vanderhorst Street  
Post Office Box 488  
Winnsboro, South Carolina 29180

Dear Mr. Goode:

In a letter to this office you questioned the sufficiency of a straw bond in a claim and delivery action in magistrate's court. In our telephone conversation you indicated you were referencing a situation where a plaintiff acts as the surety in the claim and delivery action he initiates.

[Section 22-3-1330\(a\), Code of Laws of South Carolina](#), 1982, states in part that as to a claim and delivery action:

[o]n receipt of such affidavit and an undertaking in writing, executed by one or more sufficient sureties, to be approved by the magistrate before whom such action is commenced, to the effect that they are bound in double the value of such property . . . ,

the appropriate pleadings will be issued. Such bond serves to protect the defendant in case the plaintiff does not prevail.

In [Marshall Brothers Furniture Company v. Drawdy](#), 184 S.C. 492, 193 S.E. 49 (1937), the South Carolina Supreme Court was concerned with the question of whether a plaintiff must execute the bond given by the plaintiff in a claim and delivery action brought in magistrate's court. The Court citing an earlier decision in [Polite v. Bero](#), 63 S.C. 209, 41 S.E. 305, 306 determined that: '[t]here is no requirement that the undertaking to be given by a plaintiff in a claim and delivery proceeding in a magistrate's court . . . be executed by the plaintiff, the only requirement being that 'an undertaking, in writing, executed by one or more sufficient sureties' to be approved by the magistrate, shall be delivered to the magistrate . . . It will be observed that the requirement is that on receipt of an undertaking in writing, executed by one or more sufficient sureties, not by the plaintiff-but by one or more sureties-to the effect that they, that is, the surety or sureties, are bound.' 184 S.C. 492 at 497. (Emphasis added)

Therefore, even though the question before the Court was whether a plaintiff was required to execute the undertaking, and not if he was authorized to execute such, as is your question, the Court, as quoted, stressed that what is necessary is an undertaking executed by one or more sufficient sureties independent of plaintiff obligating themselves on such undertaking. Such is consistent with a statement in 77 C.J.S., Replevin § 105(G)(2) where is provided that:

'under statutes requiring the bond to be executed 'with sufficient sureties', it has been decided that . . . (a) . . . defendant in replevin is entitled to two sureties therein, independent of plaintiff, who cannot be taken as a surety . . . The solvency of plaintiff in the replevin suit does not dispense with the necessity for the number of sureties required by statute on the bond . . . '

I am aware, however, of a practice in this State of plaintiffs acting as sureties as to claim and delivery actions initiated by such plaintiffs, particularly where the property claimed is of small value. Presumably, it could be asserted that such sureties should be deemed sufficient unless a defendant excepts to such as provided by § 23-3-1340, Code of Laws of South Carolina, 1976.

\*2 However, as referenced, the preferred course is to have the plaintiff's bond in a claim and delivery action executed by sureties other than the plaintiff. [Section 22-3-1330](#), supra, appears to be quite clear in requiring the execution of such bond by 'one or more sufficient sureties, to be approved by the magistrate.'

If there are any questions, please advise.

Sincerely,

Charles H. Richardson  
Assistant Attorney General

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